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No. 97-570

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT

Introduction

In the Brief in Opposition, Respondent Ute Tribe clearly overstates its case in several respects, is simply mistaken in others and fails to address additional arguments of substantial importance. In reply, Petitioner Counties will first address the role of the United States in this litigation and then briefly address each of the significant points raised in opposition. Initially, however, we summarily set forth the most recent proceedings in the United States District Court in Utah, where the Counties continue to be enjoined from implementing the mandate in *Hagen v. Utah*, 510 U.S. 399 (1994).

I. THE UNITED STATES DISTRICT COURT IN UTAH HAS CONTINUED TO ENJOIN PETITIONERS FROM IMPLEMENTING THE *HAGEN* MANDATE.

The current proceedings in federal district court in Utah are more than indirectly involved in this case. Petitioners have previously recounted the manner in which the mandate of this Court in *Hagen* has been held in abeyance month after month and year after year. Pet. at 1-2, 5-9. The United States District Court has continued to enjoin the Counties from implementing the *Hagen* mandate, even with respect to the homestead and townsite lands resolved by the panel's decision. Not surprisingly, the Ute Tribe supports the position of the district court in this respect. The district court's decision to continue the injunction in effect was issued in spite of the fact that the mandate of the panel's decision has now issued and in spite of the fact that a cross petition was not filed by the Ute Tribe in this Court.

Most recently, on October 15, 1997, the counties filed a "Motion to Remove Injunction Against All Homesteaded Land" in the district court. At the next previously scheduled status and scheduling conference, the issue of the

pending motion was raised by the Counties and immediately denied, without argument, in the following fashion:

> [THE COUNTIES:] As you know the county has filed its request that the injunction for the remaining Homestead lands be lifted.
>
> THE COURT: I won't deal with that until such time that the Supreme Court speaks on the petition that is currently pending.

Tr. of Court Proceedings at 9, *Ute Indian Tribe v. Utah* (Oct. 21, 1997) (No. 75-CV-408-J).

Although the district court had acknowledged receipt of the mandate from the Tenth Circuit in a hearing on a similar motion involving the City of Roosevelt the previous month, no further explanation on this point was offered. In the Roosevelt hearing, the district court unequivocally stated:

> THE COURT: Well, the mandate is here, and since the amendment by the Tenth Circuit in *Hagen* has been entered, and their mandate to this Court, it seems to me that I have *no real alternative* but to grant the motion of Roosevelt City. . . .

Tr. of Court Proceedings at 8, *Ute Indian Tribe v. Utah*, (Sept. 8, 1997) (No. 75-CV-408-J) (emphasis added). The court was mistaken if it thought that a petition for certiorari, without more, stayed the mandate and provided the court with an "alternative." *Id.*

The Counties have appended excerpts from the transcript of the status report and scheduling conference in which their motion was denied. Reply App. at 1a-5a. The excerpts make clear that in the absence of some definitive action by this Court, the mandate of this Court in *Hagen* will not be implemented at any time in the foreseeable future.[1] Because of the "jurisdictional chaos" format of "Indian country" adopted by the district court in the first instance and later accepted by the panel in

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[1] The Counties understand Fed. R. App. P. 21 provides a potential remedy. However, under the circumstances in this case it is not an acceptable alternative.

the Tenth Circuit, the federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involving "28" different land categories and hundreds of thousands of acres, started over three years ago, are still not complete. Indeed, even a cursory review of the excerpts from this hearing leaves one with the distinct impression that the "monumental job" might never be completed. Reply App. at 3a.

II. THE UNITED STATES SHOULD BE INVITED TO EXPRESS ITS VIEWS TO THIS COURT.

In opposition, the Ute Tribe mentions that, from the beginning, it has been "supported by the United States" in its post-*Hagen* assertion that this Court did not intend that *Hagen* affect historic reservation boundaries in the traditional sense. Resp'ts Br. in Opp'n to the Pet. for a Writ of *Cert.* at 12. *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570). *Nevertheless, to date, the United States is conspicuously absent in the proceedings before this Court.* For some unstated reason, for the first time in two decades the United States has decided not to submit an *amicus curiae* brief in support of the Ute Indian Tribe. The Counties respectfully submit that a few comments on this "litigation" decision are appropriate.

In the courts below, the United States unequivocally supported the post-*Hagen* argument of the Ute Indian Tribe.[2] In this respect, the arguments of the United States were contrary to two decades of submissions by the United States in cases in this Court, including *Hagen*. This Court should invite the United States to express its views and explain the reasons that prompted this radical

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[2] The arguments differed only in two respects. First, not even the United States could support the collateral estoppel claim of the Ute Tribe (which is never mentioned in the Brief in Opposition). The Ute Tribe argued that the State and the Counties could not rely on *Hagen* because of collateral estoppel—that the decision of this Court in *Hagen* was meaningless in all significant respects. Pet. App. at 17a. Secondly, the United States agreed with the State and Counties that the Uncompahgre reservation no longer exists.

shift in legal analysis. For example, the United States could then explain how it could, in this Court, agree with the meaning of the precedent and the scope of the issue presented in *Hagen*, and yet tell the courts below (in support of the Ute Indian Tribe) that historic reservation boundary disestablishment was not an issue in *Hagen*.

The absence of the United States here is even more perplexing in light of the most recent litigation position adopted by the United States. In a case pending in this Court, the United States has told this Court that it has a "strong interest in protecting the integrity of reservation boundaries" *in general*. Br. for the United States Supp'g Resp'ts, *South Dakota v. Yankton Sioux Tribe*, at 1 (No. 96-1581). In furtherance of that interest, the United States should not simply remain silent here. The United States, at the very least, should explain how, in this case, it could tell this Court one thing and then tell the court below a different story.

In the past, this Court has often requested the United States to express its views when similar questions of federal Indian law were presented. In this instance, Petitioners would respectfully submit that such a request would be especially appropriate. The United States agreed that certiorari should be granted in *Hagen* to resolve the conflict between the state and federal decisions. Br. of the United States as *Amicus Curiae* at 15, *Hagen* (No. 92-6281). And the United States participated from the beginning in the *Ute* litigation and in *Hagen* as *amicus curiae*. In fact, the arguments of the United States are noted and rejected in the text of the *Hagen* opinion. *Hagen*, 510 U.S. at 411-412.[8] In the Tenth Circuit, the United States was instrumental in convincing the courts to adopt the post-*Hagen* argument of the Ute Tribe that

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[8] All of the briefs of the United States in the diminishment/disestablishment cases prior to *Hagen* were reproduced in an appendix submitted by Uintah County in *Hagen*. In *Yankton*, Charles Mix County, *amicus curiae*, has reproduced all of the same briefs, including the brief for the United States in *Hagen*. Br. of Charles Mix County, *Amicus Curiae*, in Supp. of Pet'r. *South Dakota v. Yankton Sioux Tribe* (May 7, 1997) (No. 96-1581).

promises undisputed "jurisdictional chaos." In this light, the views of the United States should be a matter of record in this Court.

III. "THE DECISION OF THIS COURT IN *HAGEN* HAS BEEN MISCONSTRUED TO PRESERVE HISTORIC RESERVATION BOUNDARIES CONTRARY TO SUBMISSIONS IN *HAGEN* AND CONTRARY TO RELATED PRECEDENT OF THIS COURT."

A. The Counties Do Not "Admit" That This Case Is Not Certworthy.

The Counties submitted the reason for granting the writ in this case quoted above. As a preliminary matter, the Counties first address the assertion in Respondents' Brief in Opposition that our Petition *concedes* that this case is not worthy of the attention of this Court. According to the Ute Tribe:

> [T]he petitioners ultimately admit that they do not meet this Court's criteria for being granted a petition for writ of *certiorari*. *See* Pet. Br. at 30. Thus, in desperation, they appeal to this Court for "some type of appropriate relief."

Resp'ts Br. in Opp'n to the Pet. for Writ of *Cert.* at 17. *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570).

The Ute Tribe cites only the Petition at 30 in support of this assertion. The Petition at 30 sets forth the "CONCLUSION" of the Petition. The consideration reflected in the "CONCLUSION" is simply a recognition of the extraordinary demands on this Court's discretionary certiorari jurisdiction. In this instance, the Ute Tribe is clearly mistaken. We respectfully repeat our request for the certiorari consideration requested there.

B. The Counties Do Not "Misapprehend" This Court's Reservation Diminishment/Disestablishment Jurisprudence.

In response to the specific discussion in the Petition directed to the Tenth Circuit's misreading of *Hagen*, the Brief in Opposition begins with a general argument that:

> [P]etitioners misapprehend this Court's previous reservation-diminishment decisions, generally, and this Court's decision in *Hagen*, specifically.

Id.

For two decades, Duchesne County, Utah and Uintah County, Utah have participated as parties in all litigation related to this disestablishment issue. Even a cursory review of any of the briefs submitted in this litigation or in *Hagen*, including those of the Counties, demonstrates the frailty of this claim. While the Counties might not have all the answers, we at least know the question and understand the issue we briefed over a twenty-year period of time.

In the first instance, there is no disagreement in any of these briefs regarding the scope of any of this Court's reservation disestablishment/diminishment decisions or the scope of *Hagen*. Again, the Ute Tribe is simply mistaken. Further, the Brief for the *Amici* States unequivocally supports the petition in both respects—the scope of this Court's precedent and the meaning of this Court's decision in *Hagen*. Br. for the States of California and Colorado as *Amici Curiae*, in Supp. of Pet'rs at 3-12, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570). Importantly, a number of *amici* States participated in *Hagen* and in all related litigation of this Court.

C. The Ute Tribe Does Not Respond To The Graphic References To Disestablishment Submitted In *Hagen* That Are In Express Conflict With The View Of The Panel In The Tenth Circuit.

The Counties went to great length in the Petition to document the extent to which the submissions to this Court in *Hagen* are in express conflict with the views of the Tenth Circuit regarding the holding of *Hagen*. *The Ute Tribe responds to none of this—even though the most graphic references to a disestablished reservation are in the briefs submitted by the Ute Tribe in Hagen.*

For example, as we noted in our Petition, the Ute Tribe told this Court when opposing certiorari in *Hagen* in November, 1992:

> [T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of Ute Indian Tribe in Opp'n to Cert. at 1, *Hagen* (No. 92-6281) (emphasis added). *See* Pet. at 24.

On the merits, the Ute Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly stressed the scope of the issue presented. Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, 4-5, 7-8, 8-9, 9 n.5, 10 n.7, *Hagen* (No. 92-6281). *See* Pet. at 25-26. And in June, 1993, the Ute Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Tribe described to this Court the issues in exactly the same manner:

> While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply of *state* law for conduct on *non-trust lands*. . . . Therefore, any discussions between McLaughlin and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

Br. of Ute Indian Tribe at 10 n.11, 25 n.25, *Hagen* (No. 92-6281) (emphasis added). *See* Pet. at 26-27.

All other arguments submitted in *Hagen* reflect this same understanding. Pet. at 22-29. The claim in opposition that historic reservation boundaries were not at issue in *Hagen* is clearly incorrect.

D. The Claim Of The Ute Tribe That Additional Statutes Must Be Construed Is Without Merit.

To the extent that the briefs submitted to this Court in *Hagen* and the decision in *Hagen,* in proper context, establish that historic reservation boundaries were at issue in *Hagen,* the balance of Respondent Ute Tribes' opposition regarding the "three disputed categories of fee lands" (lands, by the way, that are not owned or populated by

members of the Ute Tribe) and the purported need for the construction of the additional statutes related to these fee lands is simply more smoke and mirrors. In the area at issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), or in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), or in any similarly affected area, when historic reservation boundaries were disestablished, the area ceased to be "Indian country" except for the "trust" lands—and this is true irrespective of how the other lands in the area eventually attained fee status. The applicable decisions in this Court support this position unequivocally. *See also United States v. Pelican*, 232 U.S. 442 (1913). The Ute Tribe and the Tenth Circuit recognized this principle prior to *Hagen*. Nothing in *Hagen* was intended to alter that fundamental understanding.

IV. THE EIGHTH CIRCUIT COURT OF APPEALS SQUARELY REJECTED THE VIEW OF *HAGEN* ADOPTED BY THE TENTH CIRCUIT WITH RESPECT TO THE YANKTON RESERVATION.

In the petition, the Counties pointed out the far-reaching consequences that the misreading of *Hagen* promises in other circuits (the United States raised the same argument in the Eighth Circuit). Pet. at 2, 19. As we noted, for that reason the Counties also filed an *amici curiae* brief in *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 117 S.Ct. 2430 (1997) (No. 96-1581). That brief recounts, in some detail, the legal arguments that demonstrate the extent to which *Hagen* has been seriously misconstrued by the panel in the Tenth Circuit. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r., *South Dakota v. Yankton Sioux Tribe*, (August 7, 1997) (No. 96-1581).

We initially assumed, because the Eighth Circuit Court of Appeals in *Yankton* generally rejected the Yankton disestablishment argument, it was not really necessary for that Court to deal with the post-*Hagen* argument the

United States had submitted there. In this respect, we were mistaken. We failed to notice that the Eighth Circuit actually set forth the primary disestablishment passage in *Hagen*, along with additional language from both *Rosebud* and *DeCoteau*, in the text of the *Yankton* opinion because the *Yankton Tribe and the court* deemed the Yankton documentation to be much less persuasive of disestablishment in comparison.

> The tribe argues that these comments are very weak when compared to statements made by, or to the Indians, in cases where diminishment was found. . . . In *Hagen*, the tribe was informed:
>
> > You say that [the reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no boundary line to this reservation.
>
> *Hagen*, 510 U.S. at 417, 114 S.Ct. at 968 (internal citations omitted).

Yankton Sioux Tribe, 99 F.3d at 1452.

Significantly, the Eighth Circuit then concluded:

> The Indians on these three reservations [*Hagen, DeCoteau, Rosebud*] were thus "clearly aware" that their reservations would be smaller after the sale of lands. Neither the commissioners nor the tribal members made like comments in this case. . . . [T]here is no statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.

Id. at 1453.

This "change the reservation boundary" discussion did not need more clarification. The Eighth Circuit had made

the traditional *DeCoteau* "checkerboard pattern" point earlier in the opinion, consistent with the position of the Counties in this petition.

> A *checkerboard pattern* of jurisdiction would have been the result if the Yankton reservation had been diminished by the 1894 Act. . . . There factors distinguish this case from *DeCoteau*. . . .

Id. at 1449 (emphasis added).

Clearly, the "change the reservation boundary" discussion and the recognition of the traditional *DeCoteau* "checkerboard pattern" are both squarely inconsistent with the post-*Hagen* argument the United States submitted and the misreading of *Hagen* by the Tenth Circuit.[4]

CONCLUSION

In the Petition, the Counties requested that the Petition for a Writ of Certiorari be granted and for the Court to fashion some type of appropriate relief. Alternatively, we suggested that consideration of the Petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (now scheduled for Monday, December 8, 1997) (the Yankton Sioux Tribe has divided oral argument with the United States). Because the United States has elected not to express its views to this Court regarding the panel's construction of *Hagen*, we now respectfully suggest that the United States be invited to do so at this time.

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[4] Of course, in all other respects we think the Eighth Circuit reached the wrong conclusion.

Respectfully submitted,

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November 1997

APPENDIX

APPENDIX

APPENDIX

[Excerpts from Transcript of Proceedings Dated October 21, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case 2:75-CV-00408

UTE INDIAN TRIBE,
Plaintiff,

vs.

STATE OF UTAH, *et al.*,
Defendant.

BEFORE THE HONORABLE BRUCE S. JENKINS

OCTOBER 21, 1997

REPORTER'S TRANSCRIPT OF PROCEEDINGS

STATUTE REPORT AND
SCHEDULING CONFERENCE

* * * *

[4] MR. THOMPSON: We have two very attractive maps.

* * * *

MR. THOMPSON: * * * If I may, I would like to walk the Court through what we have done to date, Your Honor, and then advise the Court the work that remains to be done because it is substantial.

* * * *

This is a compilation of I believe about 28 different land categories that were withdrawn from BIA files, BLM

files and county records. We started with these categories, and all of this has been digitized and had the individual tracks.

[5] * * * This map, Your Honor, takes the unidentified map and tries to commingle land ownership. And it's reduced to 10 categories. * * *

* * * These are our first draft efforts. They're far from final and will have subsequent maps.

Based on those categories and our understanding, collective understanding of the 10th Circuit decisions, we again commingled land and identified Indian Country, Outside Indian Country and what we call Status Under Review, and in all honesty, Your Honor, we do not know at this juncture.

* * * *

[6] The point where we are in the mapping effort, Your Honor, is we've come along way, but we've got a long way to go. We hope to have the cross hatched lands not including the townsites done, Your Honor, the areas that are under review within 90 days, and we would be willing to bring those back to the Court in 90 days. We even at that point, however, Your Honor, will not have the townsites of Myton and Randlett and Duchesne mapped. We simply do not have the resources or the time.

This map also shows as a general rule where river roads and stream locations should be, Your Honor. That does not mean where they are. So that needs to be corrected.

There are substantial ownership issues that have not been identified. Those are primarily the towns of Myton and Duchesne. There is a '62 decision, *United States vs. Utah* stipulated agreement under which the State of Utah agreed that Ute Indian Tribe owned bits of Duchesne and its tributaries and portions of the grid. Those beds have been moved. Those beds have been filled in by non-Indians, and homes and other items have been erected on them from the [7] original townsite maps. Those townsite

maps are no longer correct. All of the streets have been changed. They have been filed in. Patents have been issued. Extremely complicated. Potentially huge quiet title, Your Honor.

This map does not also, Your Honor, because we have no way at this point of overlaying, does not show minimal ownership. A substantial portion of the blue lands that appear on Map B are fee surface, but they overlay trust and reserves. So there is at least a split jurisdictional—or excuse—a division of jurisdiction over these lands depending on surface or subsurface.

And finally, Your Honor, the biggest problem we have, and I'm actually extremely proud of how far we have gotten to this point, is that there are 70 townships covered by this map, Your Honor. And those townships at least for the center of the map, the blue area and where that overlaps have to be done on a township-by-township basis so that police officers and others may identify where they are.

I will also point out that it now appears that we may—the northwestern border of Map B, Your Honor, northwest of Strawberry Acclamation area may be improperly drawn in here. We think there is a survey problem there from mountain top to mountain top as required.

* * * *

[8] * * * the federal government has been bearing the very brunt of the expense of this, within 90 days sometime after that. I believe we can have the townsites of Randlett and Myton done. It could be six months before Duchesne is done. I have no idea when we can have the townships done.

* * * *

THE COURT: Its a monumental job, and it looks like a very good beginning. * * *

* * * *

MR. GILLESPIE: We also commend the efforts of the BIA and the Ute Tribe and the BLM and all of those

who worked on [9] this map. As you know the county has filed its request that the injunction for the remaining Homestead lands be lifted.

THE COURT: I won't deal with that until such time that the Supreme Court speaks on the petition that is currently pending. I don't want to draw on them twice.

MR. GILLESPIE: * * * and I think Duchesne County is prepared to stipulate to the best map available for presumptive jurisdictional terms, and then on a case-by-case basis resolve any problems. While there's vast areas specifically of homesteaded lands that under the mandate that the Court has received should be able to be free from injunction at this point, and while the mapping process is not complete, the undertaking is probably the most—I mean, it's on the most unimaginably difficult to title search each parcel. * * *

* * * *

[10] MR. THOMPSON: * * * We have some of our own questions about their accuracy.

THE COURT: I was interested in seeing how you were doing. It's not an easy job, and it's a monumental job and for me an unending job.

MR. THOMPSON: Maybe for all of us, Your Honor.

* * * *

[11] I would suggest in response to what Mr. Gillespie has laid out on a case-by-case basis, Your Honor, we're looking at case-by-case 1983 violations. And I think that could take us off to another direction.

* * * *

[12] THE COURT: * * * And I could say come back in 10 years, but I think we're better off to say come back in 90 days.

MR. THOMPSON: Yes. And we may on that date have a map with another date knowing that we will have another map with another date.

THE COURT: And you have a whole rainbow spectrum really of interesting questions that people in the

interim ought to be thinking some about. Your suggestion where you have surface and subsurface rights is a very novel kind of question dealing with jurisdiction and persons. I've often thought it would be nice if the members of the Supreme Court could implement their own decisions.
* * *

* * * And quite frankly, I don't intend to set anything down for consideration, the [13] outcome of which is dependent upon the petition. And in the event that that's resolved, we'll set them down with appropriate notice.

* * * It's not an easy task, but it will be nice once that it's accomplished and people can feel a little more at ease.

* * * *